Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

PARKS B. BANKS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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October 2, 1997

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I. QUESTIONS PRESENTED FOR REVIEW

1. Consideration of a Groundwater Connection, to Determine Whether a Wetland is "Adjacent to" Navigable Waters of the United States, Conflicts with Decisions of the Fifth, Seventh, and First Circuit Courts of Appeal.

2. Does the Five-Year Statute of Limitations, 28 U.S.C. § 2462, that Applies to the Government's Actions for Relief at Law, also Apply to the Government's Action for Equitable Relief?

3. Can "Caprock Limestone," Which is Exposed Rock with Small Amounts of Soil and Vegetation on Top, be "Wetland" Subject to the Clean Water Act?

4. Did Nationwide Permit 26 and its Predecessors Exempt from the Clean Water Act all Filling and Dredging Activities on Land that is "Non-Tidal" and "Not Part of a Surface Tributary System" to Navigable Waters?

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IV. BASIS FOR JURISDICTION

1. The judgment of the Circuit Court, sought to be reviewed, was entered on July 24, 1997.

2. No motion for rehearing was filed in the Circuit Court. An order granting an extension of time in which to file the Petition for Writ of Certiorari was entered September 15, 1997, extending the time for filing this Petition to October 2, 1997.

3. This Court has jurisdiction to review the judgments of the Circuit Court of Appeal. 28 U.S.C.A. § 1254(1).

4. The notice requirements of Rule 29.4(b), with respect to service on the Solicitor General, have been complied with.

V. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

These are set forth in the text and footnotes.

VI. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The United States filed a Complaint December 19, 1991, pursuant to § 309 of the Clean Water Act ("CWA"), 33 U.S.C.A. § 1319 (1986). The District Court had jurisdiction pursuant to 28 U.S.C.A. § 1331 (federal question) and the CWA. The Court of Appeals had jurisdiction to

review the judgment of the District Court pursuant to 28 U.S.C.A. § 1291.

The Complaint sought civil penalties and equitable relief (restoration) for alleged pollution of "waters of the United States." The offenses allegedly began March 30, 1983, and violated CWA § 301(a), 33 U.S.C.A. § 1311(a) (1986), at five, one-acre, lots on Big Pine Key, Monroe County, Florida. Banks moved to dismiss on two grounds. First, the five-year statute of limitations had expired as to pre-1988 activities. Second, Banks did not need individual permits to fill any of the lots, as Nationwide Permit 26 and its predecessors authorized Banks' activities. The District Court denied the Motion. Immediately before trial, Banks filed a motion seeking application of the concurrent remedy doctrine to the government's demand for equitable relief.

The Court conducted a bench trial on liability, and entered a Memorandum Opinion adverse to Banks in January 1994. *United States v. Banks*, 873 F. Supp. 650 (S.D. Fla. 1995). App. 16-37. The Court set the second phase for trial and Banks re-asserted his concurrent remedy defense. The Court conducted the second phase of the trial. On September 6, 1995, the District Court rendered an unpublished *Order Requiring Restoration, and Imposing Penalty and Injunctive Relief*, App. 38-44, and a Final Judgment in favor of the United States. App. 45-46. The District Court never ruled on Banks' motions on the concurrent remedy defense. The Court's order requires restoration of areas filled more than five years before the date of filing the Complaint (December 19, 1991). On September 15, 1995, Banks perfected his appeal in the Court of Appeals.

The District Court stayed its restoration order as to those lots that were filled more than five years prior to the filing of the Complaint, until such time as the Court of Appeals rendered a decision, which it did on June 24, 1997. *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997). A motion to continue the stay until this Court acts on the instant Petition, and if granted until decided, is pending before the District Court.

B. Statement of the Facts

1. Size and Location of *Locus in Quo*

Banks owns five lots on Big Pine Key, Monroe County, Florida, the *locus in quo*. Lots IO, IP, IQ, IR (the "I" lots), and QQ. He bought QQ, IR, and IQ in 1980; IO and IP in 1988. Banks' lots are in the center of Big Pine Key. Defendant's Exhibit 7 ("D.E.7") is a 1992 aerial photograph of the middle of Big Pine Key. Two reduced copies of D.E.7 are reproduced at App. 47 and App. 48. In the first reduced photo, App. 47, the "I" lots are outlined in yellow. In the second photo, App. 48, the five lots are barely visible, outlined with a dark marker. Landmarks and wetland lines are also noted in yellow. The water west of Big Pine Key is Pine Channel; east is Bogie Channel. The two channels are navigable-in-fact.

The NW-SE road bisecting Big Pine Key, and passing between IO-IR and QQ, is Key Deer Boulevard. App. 47, 48. The road north of IO-IR, intersecting Key Deer Boulevard at an angle and bisecting Big Pine Key in the east-west direction, is Watson Boulevard.

2. Distances From the Five Lots to Tidal Waters

D.E.7 (App. 47, 48) also shows the wetland slough, allegedly including Banks' lots, outlined in blue by government witness Curtis Kruer. The slough runs approximately 1.4 mile (7,300 ft) across Big Pine Key, from Pine Channel to Bogie Channel. The distance from the closest of Banks' "I" lots, to the point where the slough enters Bogie Channel, is 0.5 mile (2,650 ft). Watson Boulevard separates the "I" lots from Bogie Channel. The distance from the "I" lots to Watson Boulevard is 0.2 mile (1,100 ft). The distance from Watson Boulevard to Bogie Channel is 0.3 mile (1,550 ft). Pine Channel is 0.8 mile (4,300 ft) southwest of the "I" lots. Key Deer Boulevard (700 ft west) separates the "I" lots from Pine Channel.

3. Banks' "Filling" Activities

Between 1980 and 1983, Mr. Banks began improving lots IQ and IR to build his home and a palm tree nursery. He brought in black dirt and gravel to provide soil for planting and to level the land in 1982-83. He planted 4,400 seed trees on IQ and IR in 1983-84. He began construction of his home on IQ in 1985-86. After buying IO and IP, Banks began to grow palm trees there, obtaining nuts from the seed trees on IQ and IR. He germinated the nuts in beds of horse manure and sawdust, then potted the seedlings in 3 and 10-gallon pots. He built a perimeter berm of silt around lots IO and IP, and grew seed trees in the berm. (The potted trees and berms, on IO and IP, have been removed pursuant to the District Court's order.)

A 1981 survey shows elevations of IQ and IR as +2.08 to +2.32 ft along the north edge of IR, and +2.23 ft to +2.55 ft along the south edge of IQ. On the government's 1993 survey, IQ and IR had post-fill elevations between +2.4 and +3.3 ft. The post-fill elevations of IQ and IR are only 3.5 to 10 *inches* higher than in 1981.

4. No Surface Water Connection Between "I" Lots and Bogie Channel

Watson Boulevard is north of the "I" lots, physically separating them from Bogie Channel. Key Deer Boulevard is west of the "I" lots, physically separating them from Pine Channel. The government maintains the "I" lots are "adjacent" to Bogie Channel, but does not contend they are "adjacent" to Pine Channel. There are no culverts or openings that allow surface water to flow through the Watson Boulevard roadbed. The road is not low enough to permit surface water to flow across the asphalt under normal conditions. Watson Boulevard is at least two ft above the surrounding grade. The roadbed is 42 ft wide at its base, and the paved roadway is 22 ft wide. The road is on the former Florida East Coast Railway grade. Construction of the original railroad bed hydrologically isolated the wetland vegetation south of Watson Boulevard. Watson Boulevard, and the railroad before it, cut off any surface water connection between the "I" lots that might have existed before construction of the railroad (between 1910 and 1912).[1] The government concedes there is no surface water connection between

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[1] Construction began on Big Pine in 1910, and the first train rolled into Key West in 1912. Parks, THE RAILROAD THAT DIED AT SEA, Langley Press, Inc., Key West, FL (1968).

the "I" lots and Bogie Channel. The government alleges there is a subsurface water connection under Watson Boulevard. Dr. Kruczynski testified:

> . . . the surface water connection would only be available if there were two feet of water that could cross the roadway. However, there is a subsurface connection through the very porous Miami oolite. In my opinion this is an adjacent wetland which has been bisected by a man-made structure which does not disrupt the flow of subsurface water underneath that roadway.

The government did not do any testing to prove the existence of a subsurface connection, but Banks does not contest its existence. The government did not allege, or offer evidence to show, that any "pollutants" from Banks' properties enter the groundwater of Big Pine Key, or emerge from the groundwater and enter the navigable waters of Bogie Channel. The government's case was based entirely on a subsurface "connection."

VII. REASONS FOR ALLOWANCE OF THE WRIT

A. The Eleventh Circuit's Reliance on a Groundwater Connection to Create Clean Water Act Jurisdiction Conflicts with Decisions of the Fifth, Seventh, and First Circuits.

Even if Banks' "I" lots are wetlands, a surface-water-to-groundwater-to-surface-water connection is insufficient to create CWA jurisdiction. Assuming Banks' lots *are* wetlands, they have been cut off from surface flow into the Gulf of Mexico for 85 years. The District Court found

that an underground hydrological connection, under Watson Boulevard, "connects" the "I" lots to Bogie Channel, and based CWA jurisdiction primarily on that connection. The Eleventh Circuit affirmed, relying primarily on *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983). The courts below also relied on an "ecological connection" which does not appear anywhere in the CWA, and has been rejected by the First Circuit in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.), *cert. denied*, 115 S. Ct. 322, 130 L. Ed. 2d 282 (1994). The courts below also relied, in part, on overwashing of Watson Boulevard during hurricanes. The Corps' § 404 regulations prohibit the use of hurricane tide levels when determining the limits of tidal waters.[2] Common sense suggests a similar rationale must be applied to this factual situation. Otherwise, every major hurricane to hit the United States would create additional CWA jurisdiction where none had existed before.

1. Inter-Circuit Conflict

Five Circuit Courts of Appeal (1st, 5th, 7th, 10th, and 11th) have reached some decision on whether groundwater may be regulated under the CWA. The Eleventh Circuit, in this case and *United States v. Tilton, supra,*

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[2] The [high tide] line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm. 33 C.F.R. § 328.3(d) (1986).

considers "groundwater-connected-to-surface-water" a *per se*[3] subject of CWA jurisdiction. CWA jurisdiction over groundwater in general was first rejected by the Fifth Circuit in 1977, based on the legislative history of the CWA. *Exxon Corporation v. Train*, 554 F.2d 1310 (5th Cir. 1977) (CWA does not give federal agencies authority to regulate groundwater). Relying on *Exxon* and the legislative history, the Seventh Circuit completely rejected "groundwater-connected-to-surface-water" CWA jurisdiction in *Village of Oconomowoc Lake v. Dayton Hudson Corp., supra*, at 24 F.3d 963 (7th Cir.) ("Even though ground water eventually reaches streams, lakes, and oceans, . . . , it is not part of the " 'waters of the United States'."). Furthermore, the First Circuit, in *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992), concluded the Corps did not have to consider the impacts of pollutants on groundwaters, in issuing a CWA permit, because groundwaters are not subject to CWA jurisdiction.

The 10th Circuit relied on a "groundwater-to-surface-water" connection as a partial basis for CWA jurisdiction in *Quivira Mining Co. v. U.S. EPA*, 765 F.2d 126 (10th Cir. 1985) (EPA has CWA jurisdiction over discharges into creeks that exhibit occasional surface water connections to navigable waters during and after heavy rainfalls, and

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[3] By *per se*, Petitioner means there is no requirement the government prove that pollution from the isolated source is actually reaching the surface water to which the groundwater is connected. *See Washington Wilderness Coalition v. Hecla Mining Co., Inc.*, 870 F. Supp. 983 (E.D. Wa. 1994) (plaintiff must allege and prove "pollutant" is carried from isolated site, via groundwater, to surface water).

have continuous groundwater connections to the same navigable waters), *cert. denied*, 474 U.S. 1055, 106 S. Ct. 791, 88 L. Ed. 2d 769 (1986).

The courts below concluded that Banks' "I" lots are part of a "continuous wetland" that would stretch to Bogie Channel if it were not bisected by Watson Boulevard. The government conceded that surface water from Banks' lots could only get to Bogie Channel if it percolated down into the groundwater table, and then migrated under Watson Boulevard, and then flowing into Bogie Channel once it reached the other side. App. 32-34.

If this set of facts leads to CWA jurisdiction, then every damp spot in the entire Southeastern United States, the Eastern Seaboard, the Great Lakes states, states bordering navigable rivers, and the states bordering the Gulf of Mexico and Pacific Ocean, is a wetland "adjacent to" navigable waters of the United States.

2. Legislative History and Interpretations by Other United States Courts of Appeal

The act prohibited by § 301(a) of the CWA is "discharge of any pollutant to navigable waters." The phrase is defined, for purposes of the CWA, in § 502(12) (33 U.S.C.A. § 1362(12) (1986)), as:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means . . . any addition of any pollutant to navigable waters from any point source. . . .

The term "navigable waters" is defined in § 502(7) of the CWA (33 U.S.C.A. § 1362(7) (1986)) as "the waters of the United States, including the territorial seas."

When the CWA was being debated in Congress in 1972, an amendment was offered on the House floor by Congressman Aspin, that would have changed the Act's definition of "discharge of a pollutant" to include "any addition of any pollutant to groundwaters from any point source." The Aspin amendment did not pass. 118 Cong. Rec. 10666 (1972), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 589-92 (Comm. Print 1973) (hereinafter "LEG. HIST."). The report of the Senate Committee on Public Works, that accompanied the bill in that chamber, reads:

> Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.

S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), 1972 U.S. Code Cong. & Admin. News, pp. 3668, 3739, *reprinted in* 2 LEG. HIST. 1491.[4] The Fifth Circuit, in *Exxon Corporation v. Train, supra,* concluded:

> . . . we have examined the structure of the Act and its legislative history in an attempt to discern the congressional intent with regard to the

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[4] *See also Washington Wilderness Coalition v. Hecla Mining Co., Inc., supra,* fn. 3, 870 F. Supp. 989-90.

> question here. *What we have found belies an intention to impose direct federal control over any phase of pollution of subsurface waters.*

554 F.2d at 1322.[5] *See also United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975) (injecting wastes into groundwater not regulated by FWPCA);[6] *Kelley v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985).

In *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992), the First Circuit followed *Exxon v. Train*, *United States v. GAF Corp.*, and *Kelley v. United States*, *supra*. The *Norfolk* panel concluded that, although the definition does not indicate whether groundwaters are "waters of the United States," the Army Corps of Engineers has interpreted the definition to apply only to surface waters. The First Circuit added another basis to its rationale, that groundwaters are not part of the "aquatic ecosystem." Quoting the District Court, the *Norfolk* panel adopted the following language.

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[5] The Fifth Circuit left a window open to be decided another day.

> * * * EPA has not argued that the wastes disposed of into wells here do, or might, "migrate" from groundwaters back into surface waters that concededly are within its regulatory jurisdiction. * * * We mean to express no opinion on what the result would be if that were the state of facts.

Exxon v. Train, 554 F.2d at 1311 n.1. The government has not made these allegations in the instant case.

[6] The 1972 Act was called the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"). The Act was renamed the Clean Water Act ("CWA") in 1977.

> The plain language of the [EPA] Guidelines clearly constrains the [CWA permitting] alternatives analysis . . . to effects on the aquatic ecosystem. "Aquatic ecosystem," in turn, is defined as "waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals." 40 C.F.R. § 230.3(c) The Corps' determination that groundwater sources are not aquatic ecosystems was clearly a reasonable interpretation of [40 C.F.R.] § 230.10(a), as [groundwater sources] cannot be said to "serve as habitat for interrelated and interacting communities and populations of plants and animals." While the impact on groundwater is certainly an "environmental consequence," the alternatives analysis is limited to comparison of effects on the aquatic ecosystem.

968 F.2d at 1450. In a 1994 Seventh Circuit decision, *Village of Oconomowoc Lake v. Dayton Hudson Corp., supra,* a municipality tried to prevent the construction of a warehouse. The village alleged rainwater runoff from the warehouse's parking lot would seep into the ground at the facility's 6-acre stormwater retention pond, and pollute groundwater, and the polluted groundwater would eventually enter surface waters. The Seventh Circuit panel, relying on *Exxon v. Train, supra,* and answering the question the *Exxon* panel left "for another day," rejected the village's theory.

> Some water from the pond evaporates into the air, and the rest seeps into the ground. *Even though ground water eventually reaches streams, lakes, and oceans,* the court held, *it is not part of the "waters of the United States".*

24 F.3d at 963 (emphasis added).

3. The Facts of this Case are Common to the Millions of Acres of Isolated Wetlands Throughout the United States

The government alleged Banks discharged "pollutants" on the surface of his property, not into groundwater, nor by way of groundwater into Bogie and Pine Channels. The government did not allege, or prove, that the pollutants deposited on Banks' lands entered the groundwater, passed under Watson Boulevard, reemerged on the other side of Watson Boulevard, and ultimately entered Bogie Channel, over 1/2 mile away. This ultimate issue was not addressed, as suggested in *Washington Wilderness Coalition v. Hecla Mining Co., Inc., supra,* fn. 3.

The Corps' rules define "adjacent" in terms of *proximity.*[7] Yet the decision below depends on everything but

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[7] 33 C.F.R. § 328.3(c) reads:

> The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

The definition was a response to concerns over vagueness of the 1975 terms, "contiguous" and "adjacent." In the preface to its rule, the Corps wrote:

> We have defined the term "adjacent" to mean "bordering, contiguous, or neighboring." The term would include *wetlands that directly connect to other waters* of the United States, *or* that are *in reasonable proximity* to these waters *but physically separated* from

proximity; i.e., wading birds, Key deer, historical conditions, flooding during hurricanes, and groundwater connections.[8] Banks' lots are more than 1/2 mile from the navigable waters the government argues they are "adjacent" to. In *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983), a wetland was separated from a navigable river by a 30 ft river berm. The Eleventh Circuit's *Tilton* panel noted the possibility of a serious problem, when it stated the following.

> It may be that the *extravagant reach of the regulations would raise serious problems* if literally applied under some hypothetical situations. Such problems, however, are not before the court under the present facts.

705 F.2d 431. In the case for which Certiorari is sought, the barrier is not a river berm, it is an 85-year old roadway that completely blocks surface water flow (except

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> them by man-made dikes or barriers, natural river berms, beach dunes, and *similar obstructions*.

42 Fed. Reg. 37122, 37128-29 (July 19, 1977) (emphasis added).

[8] The government's wetland expert, Dr. Kruczynski, described what *he* considers to be the four criteria for "adjacency." He stated in his field report that an "adjacent wetland" should be:

> 1. *Reasonably close* to the water to which it is adjacent;
>
> 2. *Historically connected* to those waters; and
>
> 3. Part of the *same biological system* (wading bird usage was noted).
>
> 4. Potential exists for flooding from waters to which it is adjacent.

Admin. Rec: 114 at 5.

possibly in a direct hit by a major hurricane). Banks' lots are not 30 feet from navigable waters, they are at least 2,650 feet (1/2 mile) from the water and 1,100 ft inland from the road.

B. The Statute of Limitations, 28 U.S.C.A. § 2462, Should Apply to the Government's Request for Equitable Relief

The government did not seek civil penalties for Banks' alleged filling activities before 1990, because it was barred from doing so by the Statute of Limitations at 28 U.S.C.A. § 2462. The trial court ordered Banks to remove fill from Lots IQ, IR, and QQ that he placed there *more than five years before the filing of this action*. Banks argued the statute of limitations should apply to equitable remedies under the CWA, under the concurrent remedy doctrine. The leading case is *Cope v. Anderson*, 331 U.S. 461, 464, 67 S. Ct. 1340, 91 L. Ed. 1602 (1947). Banks directs the Court to the opinions in *United States v. Windward Properties, Inc.*, 821 F. Supp. 690 (N.D. Ga. 1993), *abrogated, United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997), and *United States v. Telluride Co.*, 884 F. Supp. 404 (D. Co. 1995), for support.

The statute of limitations applies to both civil penalties and injunctive relief. The *Windward* court held:

> Plaintiff argues that, because [§ 2462] applies only to actions "for the enforcement of any civil fine, penalty or forfeiture," it does not apply to requests for injunctive relief. The Court concludes, however, that the weight of authority dictates a contrary result. *The majority of courts*

> *that have considered the question, including the Supreme Court, have held that when legal and equitable relief are available concurrently (i.e., when an action at law or equity could be brought on the same facts), "equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy", Cope v. Anderson,* 331 U.S. 461, 464, 67 S. Ct. 1340 (1947). *See also Russell v. Todd,* 309 U.S. 280, 289, 60 S. Ct. 527[, 84 L. Ed. 754] (1940); *United Transp. Union v. Florida East Coast Ry.,* 586 F.2d 520, 524 (5th Cir. 1978) (when "both legal and equitable relief [are] sought- . . . the statute of limitations bars both"); *Gilbert v. City of Cambridge,* 932 F.2d 51 (1st Cir.) *cert. denied,* [502 U.S. 866,] 112 S. Ct. 192[, 116 L. Ed. 2d 153] (1991) ("It is well settled . . . that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy."); *Nemkov v. O'Hare Chicago Corp.,* 592 F.2d 351, 354-55 (7th Cir. 1979); *Saffron v. Department of Navy,* 561 F.2d 938, 942-43 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1033, 98 S. Ct. 765[, 54 L. Ed. 2d 780] (1978).

In *United States v. Telluride Co., supra,* the court reached the same conclusion. The *Telluride* court rejected the contrary position of the court in *United States v. Hobbs,* 736 F. Supp. 1406 (E.D. Va. 1990) As to *Hobbs,* the *Telluride* court stated:

> The Hobbs court relied solely on cases in which an equitable remedy was the only remedy at issue. *See, e.g.* [*Holmberg v. Armbrecht,* 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed. 743 (1946)]; [*North Carolina Wildlife Fed'n v. Woodbury,* 29 ERC 1941, 19 ELR 21308 (E.D.N.C. 1989)]. It made no reference to cases in which legal and equitable relief

are sought in the same complaint and did not cite the leading case of *Cope v. Anderson*, 331 U.S. 461, 464, 67 S. Ct. 1340, 91 L. Ed. 2d 1602 (1947).

The *Telluride* court's holding is consistent with the ancient preference for money damages over specific, equitable relief. *See, e.g.*, 1 Holdsworth, A HISTORY OF ENGLISH LAW, 475 (7th Ed. 1956); *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94, 53 S. Ct. 50, 77 L. Ed. 185 (1932). "[Equity] thus stays its hand in aid of legal right" which is barred by the statute of limitations. *Russell v. Todd*, 309 U.S. at 289.

In a recent decision, the D.C. Circuit analyzed § 2462 in a TSCA action. *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994). The court weighed the role of statutes of limitations generally. It noted: "in a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable." *Id.* at 1457, quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 2 L. Ed. 297 (1805). *See also United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) ("it would be utterly repugnant to the genius of our laws to allow such prosecutions a perpetuity of existence"). When Congress intended to make an exception to § 2462 by providing a longer period before the statute runs, or by tolling the statute, it has clearly expressed that intent. *Badarraco v. Commissioner*, 464 U.S. 386, 104 S. Ct. 756, 78 L. Ed. 2d 549 (1984) (collecting fraudulently withheld taxes not subject to § 2462).

Moreover, there is no principled argument that can support choosing the policies underlying the CWA over the centuries-old policies that underlie statutes of limitations. In short, any other "interpretation of § 2462

advanced by the government is in derogation of the right to be free from stale claims, which comes in time to prevail over the right to prosecute them." *United States v. Core Lab.*, 759 F.2d 480, 483 (5th Cir. 1985), citing *Burnett v. New York Central Ry. Co.*, 380 U.S. 424, 428, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965).

Some courts have gone beyond the language of the CWA to find "continuing violations." This was done either in the context of calculating civil penalties[9] or for purposes of conferring federal question jurisdiction in citizen suits for injunctive relief.[10] When the filling of wetlands has ceased before the filing of a complaint, however, courts have found no "continuing violation." *Bettis v. Town of Ontario, New York*, 800 F. Supp. 1113, 1118-19 (W.D.N.Y. 1992) (interpreting 33 U.S.C.A. § 1365 (1986)). As the Ninth Circuit recently found, the "continuing violation doctrine is of no assistance or applicability, because mere 'continuing *impact* from past violations is not actionable. Continuing violations are.' " *McDougal v. County of Imperial*, 942 F.2d 668, 675 (9th Cir. 1991) (rejecting argument that County's taking of their property was a continuing violation of their civil rights).

C. Other Reasons Raised Below

Banks raised two other grounds for dismissal of the CWA action against him. They were not briefed in this Petition for Certiorari because they do not appear to meet

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[9] *United States v. Ciampetti*, 669 F. Supp. 684 (D.N.J. 1987).

[10] *North Carolina Wildlife Fed'n v. Woodbury*, 29 ERC 1941 (E.D.N.C. 1989).

the criteria set out in this Court's Rule 10. Those issues are mentioned briefly below in the event this Court considers them important enough to be considered in the context of the balance of this case.

1. The Unbridled Discretion Exercised by the Corps of Engineers and EPA in Adding Acreage to the CWA's Jurisdiction by Defining "Wetlands" More Expansively than Congress has Done

In 1980, all five of Banks' lots were 100% exposed, solid limestone rock (known as "caprock," or "caprock limestone"), with small pockets of organic material that supports some vegetation. To be a CWA wetland, it must meet a 3-part test; wetland hydrology, wetland vegetation, and *hydric soils*. The government's expert described the lots as having "little or no soils on the property." The 1989 WETLANDS DELINEATION MANUAL, from which the notion of "caprock wetlands" originated,[11] was rejected

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[11] The 1989 MANUAL identified 13 "Problem Area Wetlands." One category was "caprock limestone wetlands."

> Caprock Limestone Wetlands – These wetlands are found in the Everglades region of southern Florida. The substrate, commonly called "rockland," is composed mainly of Miami oolite or Tamiami limestone with a very thin covering of unconsolidated soil material in places. * * * * Hydric soils may not be present in many places in these wetlands, since substrate (consolidated material) predominates and little or no soil (unconsolidated material) may exist. Despite the lack of hydric soils in places, these areas are wetlands because they meet the wetland hydrology criterion.

by Congress in 1991 as an abuse of CWA permitting authority, and the 1987 MANUAL substituted in its place.[12] Yet, the government and the courts below concluded the lots were "caprock wetlands."

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[12] On August 17, 1991, President Bush signed the prohibition on using the 1989 MANUAL into law. It reads:

> None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under the * * * (1989 MANUAL) or any subsequent manual not adopted in accordance with the requirements for notice and public comment of the rule-making process of the Administrative Procedure Act.
>
> In addition, regarding Corps of Engineers ongoing enforcement actions and permit applications involving lands which the Corps or EPA has delineated as waters of the United States under the 1989 MANUAL, and which have not yet been completed on the date of enactment of this Act, the landowner or permit applicant shall have the option to elect a new delineation under the Corps 1987 WETLAND DELINEATION MANUAL, or completion of the process or enforcement action based on the 1989 MANUAL delineation * * *

Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104 (August 17, 1991), *reprinted in* U.S.C.C.A.N. (105 Stat.) 510, 518.

> Congress made its position semi-permanent in the 1993 appropriations bill. *Energy and Water Development Appropriations Act of 1993*, Pub. L. No. 102-377 (October 2, 1992), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 1315, 1324 (Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 MANUAL, as it has since August 17, 1991, until a final wetlands delineation manual is adopted.).

There was a flurry of judicial activity over the 1989 MANUAL. *See, e.g., United States v. Ellen*, 961 F.2d 462 (4th Cir.), *cert. denied*, 506 U.S. 875, 113 S. Ct. 217, 121 L. Ed. 2d 155 (1992) (1989 MANUAL created significant increase in lands identified as wetlands as compared with 1987 MANUAL); *Merlino v. United States*, 33 ERC 1262, 21 ELR 21322 (W.D. Wa. 1991) (plaintiffs' claim 1989 MANUAL resulted in substantial enlargement of § 404 jurisdiction); *Mulberry Hills Devel. Corp. v. United States*, 772 F. Supp. 1553 (D. Md. 1991) (plaintiff said 1989 MANUAL designated 21 acres wetlands, 1987 MANUAL only 14). The 1989 MANUAL specifically states "caprock limestone wetlands" *do not meet the mandatory 3-part test* of the Corps' 1987 MANUAL. In addition, EPA and the Corps *deleted* the "caprock limestone wetland" category in a proposed rule, published in 1991, that may yet amend the 1989 MANUAL. 56 Fed. Reg. 40446-80 (Aug. 14, 1991).

2. The Interpretation of Nationwide Permit 26 and its Predecessors

Banks argued that, from July 22, 1982, to January 21, 1992, Nationwide Permits ("NWPs") in the Corps' regulations allowed the placement of dredged or fill materials onto certain waters of the United States, in areas from 1 acre to thousands of acres, without an individual § 404 permit. Banks' lands, even if they were waters of the United States, were always eligible for these NWPs. The two criteria that had to be met were (a) that the "waters" be non-tidal, and (b) that they "not be part of a surface tributary system to interstate or navigable waters." The

government's expert conceded there are no "surface tributary systems" in the Keys. Therefore, the subject lands from 1982-92 were "not part of a surface tributary system to interstate waters or navigable waters of the United States." Furthermore, there was no contention that Banks' lands contain:

> . . . waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun.

33 C.F.R. § 328.3(f) (1995) (definition of "tidal waters"). All five lots are "non-tidal." Therefore, Banks' lands were exempt from CWA permitting requirements.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-5167

D.C. Docket No. 91-10107-CIV

UNITED STATES OF AMERICA,

Plaintiff-Counter-defendant, Appellee,

versus

PARK [sic] B. BANKS,

Defendant-Counter-claimant, Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(Filed Jun. 24, 1997)

Before TJOFLAT and EDMONDSON, Circuit Judges, and O'NEILL*, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

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* Honorable Thomas N. O'Neill, Jr., Senior U. S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that defendant-appellant pay plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 24, 1997
For the Court: Maguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 8/18/97

UNITED STATES of America,
Plaintiff-Counter-Defendant-Appellee,

v.

Park [sic] B. BANKS,
Defendant-Counter-Claimant-Appellant.

No. 95-5167.

United States Court of Appeals,
Eleventh Circuit.

June 24, 1997.

Government brought enforcement action against landowner under Clean Water Act (CWA), requesting that he be enjoined from future discharges of dredged or fill materials into wetlands on his property, that he be required to restore wetlands to their undisturbed condition, and that he be required to pay civil penalty. The United States District Court for the Southern District of Florida, No. 91-10107-CIV-JLK, James Lawrence King, J., held that landowner violated CWA. Landowner appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) abrogating *Windward Properties, Inc.*, 821 F.Supp. 690, government's claims for equitable relief were not subject to five-year statute of limitations; (2) evidence supported finding that landowner's lots were "adjacent wetlands"; and, (3) landowner failed to meet his burden of showing that any of his discharge activities onto wetlands were permissible under nationwide permit 26 (NWP 26).

Affirmed.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and EDMONDSON, Circuit Judges, and O'NEILL*, Senior District Judge.

EDMONDSON, Circuit Judge:

Defendant-Appellant Parks B. Banks appeals the district court's holding that he violated the Clean Water Act ("CWA") by discharging dredged material and fill onto wetlands. Because we find that the district court's application of the CWA to Banks' lands involved no clear error, we affirm.

Facts and Background

Section 404(a) of the CWA, 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Corps of Engineers ("Corps"), to issue permits for discharges of "dredged or fill material" into waters of the United States. The Corps may authorize these discharges through both individual permits and general, regulatory permits.

In 1980, Banks purchased three lots – lots QQ, IQ and IR – in Big Pine Key in Florida.[1] Banks began bulldozing lots IQ and IR and covering the lots with fill. Filling

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* Honorable Thomas N. O'Neill, Jr., Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] From 1980 through 1988, Banks purchased five lots on Big Pine Key. Four of the lots – lots IO, IP, IQ and IR – are contiguous, while the fifth – lot QQ – is approximately one-fourth of a mile southeast of the other four lots. Pine Channel is to the west of the lots, and Bogie Channel is on the east.

continued through approximately 1983, when Banks planted coconut trees on the filled lots and built a house on lot IQ. In March 1983, a Corps biologist informed Banks that parts of lots IQ and IR were wetlands and that discharges onto those areas were unlawful without a permit. In April 1983, the Corps issued a cease and desist order, threatening enforcement action if Banks continued his discharges. The order suggested that Banks apply for an individual permit to authorize retroactively his activities. Banks applied for this "after-the-fact" permit, but the Corps denied it in April 1984. The Corps also told Banks that, to avoid an enforcement action, he must negotiate a restoration plan with them. Banks continued to discharge fill without a permit and entered into no negotiations for a restoration plan.

In 1988, Banks purchased lots IO and IP, located just south of lots IQ and IR. From 1988 to 1991, Banks cleared vegetation from these new lots and prepared them for coconut farming. During this time, Banks also added fill to Lot QQ.

In 1990, the Corps issued four cease and desist orders to Banks, accusing him of discharging fill into U.S. waters without a permit despite clear notice that his conduct was illegal. In December 1991, the government filed this suit against Banks, requesting that the district court enjoin future discharge of additional dredged or fill materials into the wetlands on the property, require Banks to restore the wetlands to their undisturbed condition before such unlawful discharge by removing the fill and otherwise implementing a restoration plan, and require

Banks to pay an appropriate civil penalty.[2] Banks appealed.

Discussion

I. *Statute of Limitations*

Because the CWA does not specify a limitations period for enforcement actions under § 309, 33 U.S.C. § 1319, the default limitations provisions of 28 U.S.C. § 2462[3] apply to the government's actions for civil fines or penalties. The parties dispute, however, the applicability of this statute of limitations to claims for equitable relief.[4]

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[2] In the light of the application of the statute of limitations to the government's claims for civil penalties, discussed below, the United States sought civil penalties in this case only for Banks' filling activities in 1989 and 1990.

[3] Section 2462 provides in pertinent part:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.

[4] The government argues that Banks waived his statute of limitations defense for equitable relief by failing to raise it in a responsive pleading as required by Fed.R.Civ.P. 8(c). It is true that Banks raised the statute of limitations issue on the equitable claims by motion the day the trial began, which would normally waive the defense. *American National Bank of Jacksonville v. FDIC*, 710 F.2d 1528, 1537 (11th Cir.1983).

The government, however, neither objected nor responded to Banks' motion. Banks contends that the government, therefore, consented to litigate this issue under Fed.R.Civ.P.

Traditionally, "statutes of limitation are not controlling measures of equitable relief." *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 584, 90 L.Ed. 743 (1946). The plain language of section 2462 does not apply to equitable remedies. *See North Carolina Wildlife Federation v. Woodbury*, Case No. 87-584-CIV-5 (E.D.N.C.1989) ("The express terms of 28 U.S.C. section 2462 apply only to suits for the enforcement of a 'civil fine, penalty or forfeiture.' "); *United States v. Hobbs*, 736 F.Supp. 1406, 1410 (E.D.Va.1990) ("[Section 2462], by its own terms, has no bearing on suits in equity.")

Banks, however, urges us to adopt the "concurrent remedy rule," which provides that "equity will withhold its relief . . . where the applicable statute of limitations

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15(b), which provides that "unpled issues which are tried with either express or implied consent of the parties are to be treated as if they were raised in the pleading." *Cioffe v. Morris*, 676 F.2d 539, 541 (11th Cir.1982). The government did not expressly consent to litigate this matter; the sole question is whether the government impliedly consented by failing to object or respond. We believe that it did.

"[I]mplied consent under Rule 15(b) will not be found if the [opposing party] will be prejudiced, that is, if the [opposing party] had no notice of the new issue, if [he] could have offered additional evidence in defense, or if the [opposing party] in some other way was denied a fair opportunity to defend." *Id.* at 542. Here, the government was fully aware of Banks' position and simply chose not to respond to Banks' motion. We, therefore, believe that the government impliedly consented to the litigation of the statute of limitations issue for the equitable claims. Because, however, we conclude that the statute of limitations does not apply to claims for equitable relief brought by the government in its sovereign capacity, our conclusion ultimately affords Banks no relief.

would bar the concurrent legal remedy." *Cope v. Anderson*, 331 U.S. 461, 464, 67 S.Ct. 1340, 1341, 91 L.Ed. 1602 (1947).[5] Banks relies chiefly on *United States v. Windward Properties, Inc.*, 821 F.Supp. 690 (N.D.Ga.1993) to support his position. In *Windward*, the government sought equitable relief and civil penalties under section 309 of the CWA against the defendant for unpermitted discharge of dredged or fill materials into streams and adjacent wetlands. There, the court applied the concurrent remedy rule to bar the government's claims for equitable relief under similar facts to this case. *Id.* at 693.

The *Windward* court, however, did not address the well-established rule that "an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it," *E.I. du Pont de Nemours & Co. v. Davis*, 264 U.S. 456, 462, 44 S.Ct. 364, 366, 68 L.Ed. 788 (1924); *United States v. Alvarado*, 5 F.3d 1425, 1427 (11th Cir.1993), or the canon of statutory construction that "any statute of limitations sought to be applied against the United States 'must receive a strict construction in favor of the Government.' " *Alvarado*, 5 F.3d at 1428.

Incorporating these principles into the analysis, the properly constructed rule is that – absent a clear expression of Congress to the contrary – a statute of limitation does not apply to claims brought by the federal government in its sovereign capacity. The statute is enforced

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[5] The government in this case, contending that the statute of limitations does not apply to equitable claims, sought equitable relief only for Banks' violations that occurred outside section 2462's limitations period.

against the government only when the government is acting to vindicate *private* interests, not a sovereign or public interest. *See United States v. Beebe*, 127 U.S. 338, 347, 8 S.Ct. 1083, 1088, 32 L.Ed. 121 (1888).[6]

We conclude, therefore, that the concurrent remedy rule cannot properly be invoked against the government when it seeks equitable relief in its official enforcement capacity. Because Congress did not expressly indicate otherwise in the statutory language of section 2462, its provisions apply only to civil penalties; the government's equitable claims against Banks are not barred.

II. *Jurisdictional Wetlands*

Banks also disputes that his lots qualify as jurisdictional wetlands. Wetlands are "those areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. § 328.3(b). A "wetland" under the CWA must meet the three criteria set out in the

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[6] In *Federal Election Commission v. Williams*, 104 F.3d 237 (9th Cir.1996), the Ninth Circuit applied section 2462 to bar the FEC's action for injunctive relief, citing to *Cope v. Anderson*, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947). The *Williams* decision – not unlike the *Windward* opinion – failed to distinguish between the application of the statute of limitations to the United States in its private versus its sovereign capacity. No other circuit has addressed this issue.

Corps' 1987 *Wetlands Delineation Manual:*[7] (1) a prevalence of hydrophytic plants, (2) hydrological conditions suited to such plants, and (3) the presence of hydric soils.

Banks specifically contests the district court's finding that his lots meet the hydric soil criterion; he cites the report of one of the government's experts, Dr. Kruczynski, who was the Environmental Protection Agency's leading regional wetlands biologist. In his report, Dr. Kruczynski concluded: "There is *little or no soil* at this location . . . Caprock limestone wetlands are described in the [1989 Corps Delineation Manual] as a Problem Area . . . and meet the criteria *despite the lack of hydric soils* when wetland hydrology is present."[8] In the light of other evidence presented at trial, however, we find that the district court's conclusion about the hydric soil criterion was not clearly erroneous.

First, Dr. Kruczynski explained in testimony that he did not spend a lot of time analyzing the soils on Banks'

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[7] Banks challenges the Corps' use of the 1989 version of this Manual, which Congress ultimately banned. Banks argues that the 1989 Manual, which was used to evaluate some of his land, greatly expanded the lands that could be classified as wetlands by allowing certain land – such as caprock limestone – to qualify as regulatable wetlands despite its failure to satisfy all three criteria in the 1987 Manual. The district court, however, found that the evidence proved that Banks' lands met all three of the *1987 Manual's* criteria, rendering Banks' argument moot. Our focus is limited to whether, based on the evidence presented to the district court, its factual findings were clearly erroneous.

[8] At the time of Dr. Kruczynski's analysis, Congress had not yet banned the 1989 Manual. Dr. Kruczynski's analysis was conducted with the 1989 Manual which, unlike the 1987 Manual, incorporates caprock limestone wetlands.

lots for his report: the soils present were clearly hydric and the quantity of soil was not critical in the 1989 Manual, under which he was properly operating at the time. He also testified that he would have classified Banks' lots as wetlands under the 1987 Manual.

The government also presented other expert testimony about soil conditions on Banks' land. For example, Dr. Wade Hurt, a soil scientist who formerly headed the Florida office of the U.S. Department of Agriculture's Soil Conservation Service, testified that Banks' lots, before his clearing and filling, would have been approximately 30 percent exposed rock, 15 percent non-hydric soils and 55 percent hydric soils. Dr. Ronald Jones, a professor of environmental sciences, and Curtis Kruer, a former Corps employee and biologist with special expertise in water level monitoring and aerial photography interpretation, also testified that Banks' lands were wetlands under the 1987 Manual's criteria.

"If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (applying clearly erroneous standard to district court's determination that respondent's property met wetlands criteria). Sufficient plausible evidence supports the district court's decision.

III. *Adjacent Wetlands*

The district court concluded that Banks' lands were wetlands adjacent to navigable, tidal waters and therefore subject to the Corp's regulatory jurisdiction. *See* 33 C.F.R. § 328.3(a)(1), (7) (1995). Banks disputes, however, that his lands are adjacent[9] "wetlands."

Sitting as trier of fact, the district court found that "the Lots are part of a meandering wetland slough traversing Big Pine Key to Pine Channel on the west and Bogie Channel on the east." Banks contests this finding, arguing that his lots – if wetlands at all – are isolated ones, because they are all at least one half mile from either of the navigable channels and have no hydrological relationship with these waters. Banks also contends that Watson Boulevard, a paved road, blocks water flow between Banks' lots and Bogie Channel.

We find that the district court's determination that Banks' lands were adjacent wetlands is not clearly erroneous. Experts testified that a hydrological connection exists between Banks' lands and Pine and Bogie Channels. This connection was primarily through groundwater, but also occurred through surface water during storms. The court also found ecological adjacency based on the water connections and the fact that the lots serve as habitat for birds, fish, turtles, snakes and other wildlife.

In *United States v. Tilton*, 705 F.2d 429 (11th Cir.1983), we addressed the issue of adjacency under similar facts.

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[9] Adjacent is defined as "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c) (1995).

Finding the defendant's swamp was an adjacent wetland, we relied on similar evidence to establish hydrological and ecological links with the nearby river. Also, in *Tilton* – as here – the hydrological connection flowed mainly through ground water; the surface water only connected at extreme high tides, such as in hurricanes. *Id.* at 431 n. 1. In the light of *Tilton*, the district court committed no clear error in finding Banks' lands have the hydrological connection needed to qualify as adjacent wetlands.[10]

With regard to Watson Boulevard, man-made dikes or barriers separating wetlands from other waters of the United States do not defeat adjacency. 33 C.F.R. § 328.3(c). The district court therefore properly rejected Banks' argument to the contrary.

IV. *Nationwide Permit 26 (NWP 26)*

Banks argues that even if his lands qualify as jurisdictional, adjacent wetlands, some of his discharge activities were permissible under NWP 26. The CWA provides that the Corps can issue general permits on a state, regional or nationwide basis under certain circumstances. 33 U.S.C. § 1344(e). From 1980 through 1994, the Corps has administered five versions of NWP 26, covering the discharge of material into navigable waters of the United States that are either (1) above the headwaters or (2) are

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[10] Because the district court did not err in characterizing Banks' lands part of one continuous wetland, Banks' argument that his lands were outside the scope of regulation because they were adjacent to waters that were themselves wetlands, as described in 33 C.F.R. § 328.3(a)(7), also fails.

other non-tidal waters that are not part of a surface tributary system to interstate waters or navigable waters.

Banks' position is that the Corps expanded the scope of non-tidal waters into which discharges were authorized by NWP 26 in its 1982 rule, but then contracted the scope in its 1991 rule. Banks contends that some of his discharge activity during the period from 1982 to 1992, therefore, was within the scope of the NWP 26 because the waters into which he discharged met the definition at that time of "non-tidal waters that are not part of a surface tributary system to interstate waters or navigable waters." The government, however, disputes this contention, arguing that wetlands adjacent to navigable waters – such as Banks' lots – have always been considered included in the term "surface tributary system," and that the Corps has consistently construed and enforced this provision.

The district court correctly rejected Banks' argument that NWP 26 authorized some of his discharges, because Banks failed to carry his burden of persuasion on this issue. *See United States v. Cumberland Farms of Conn., Inc.*, 826 F.2d 1151, 1157 (1st Cir.1987) (holding party seeking to qualify under nationwide permit had burden of persuading court of permit's applicability); *see also Riverside Irrigation District v. Andrews*, 758 F.2d 508, 514 (10th Cir.1985). The Corp's interpretation of its own regulations, not Banks' interpretation, is entitled to substantial deference. *Lyng v. Payne*, 476 U.S. 926, 939, 106 S.Ct. 2333, 2341-42, 90 L.Ed.2d 921 (1986), *reh'g denied*, 478 U.S. 1031, 107 S.Ct. 11, 92 L.Ed.2d 766 (1986). In Banks' particular case, the Corps consistently construed his acts to be outside the scope of NWP 26; as early as 1983, Banks was

specifically told by the Corps that his activities required a permit. In 1984, the Corps denied Banks' application for an after-the-fact permit for his discharge activities. Banks has not met his burden to show that any of his lots fell within the scope of NWP 26's "other non-tidal waters that are not part of a surface tributary system to interstate waters or navigable waters" between 1982 and 1992.

We, therefore, conclude that the statute of limitations does not bar the government's claims for equitable relief in this case, and that the district court's finding that Banks' land constituted jurisdictional, adjacent wetlands was not clearly erroneous. We further hold that Banks has failed to demonstrate that some of his activities were permitted by NWP 26. The judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-10107-CIV-KING

UNITED STATES OF AMERICA,

Plaintiff/Counterdefendant,

v.

PARKS B. BANKS,

Defendant/Counterplaintiff.
_____/

MEMORANDUM OPINION

This Clean Water Act case involves property on Big Pine Key, an island located in a chain of islands known as the Florida Keys. The United States alleges that the Defendant, Parks B. Banks, unlawfully placed pollutants in the form of fill material in adjacent freshwater wetlands without a permit. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345 and 1355, and 33 U.S.C. § 1319(b).

I. The Nature of the Action

The Plaintiff, United States of America, seeks to obtain injunctive relief and civil penalties against the Defendant, Parks B. Banks, for violation of Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a). The United States alleges that Banks has filled, without obtaining a permit, five freshwater wetland Lots located on Big Pine Key, Florida. The United States further contends that the wetlands Lots are adjacent to navigable waters of the United States in that Lot QQ is adjacent to Pine Channel, and Lots IR, IQ, IP and IO are adjacent to

Bogie Channel. For relief, the United States requests that the Court (a) enjoin the discharge by Banks of additional dredged and fill materials into the freshwater wetlands, (b) require Banks to remove materials which he has heretofore unlawfully discharged into the wetlands, (c) require Banks to restore the wetlands to their undisturbed condition prior to such unlawful discharges, and (d) require Banks to pay appropriate civil penalties.

Parks B. Banks admits to placing fill on the subject Lots, but alleges that the property is not jurisdictional wetlands, and therefore, did not require a Section 404 permit under the provisions of the Clean Water Act, 33 U.S.C. § 1344. Banks does not challenge the Corps' denial on April 5, 1984, of his after-the-fact individual permit application to fill Lots IR and IQ.

The trial in this matter was bifurcated in the interests of judicial economy, with the liability phase {items (a) and (b), above} tried in a bench trial, leaving issues of remedy and penalty {items (c) and (d), above} for later resolution by the Court.

For the reasons set forth below, the Court concludes that judgment must be entered for the Plaintiff. The Court finds that, from 1980 to 1983, the Defendant placed unauthorized fill on Lot IR and a portion of Lot IQ on Big Pine Key, Florida, which the Court finds to have been jurisdictional adjacent freshwater wetlands. These wetlands were adjacent to navigable and tidal waters of the United States. Further, the Defendant did not remove the fill when ordered by the United States Army Corps of Engineers in 1984 to do so after the Corps denied his after-the-fact permit application. In the years following

this permit denial, the Defendant placed additional fill on three other Lots he owned on Big Pine Key. These Lots, IP, IO and QQ, the Court also finds to be adjacent freshwater wetlands that could not be lawfully filled without a permit from the Corps. All of the unauthorized filling activities, as well as land-leveling and removal of natural vegetation were performed by the Defendant and his agents, to convert the sites to uplands for use in the Defendant's coconut tree farm operations.

II. FINDINGS OF FACT

1. The United States alleges Parks B. Banks has violated the Clean Water Act[1] ("CWA") by his unauthorized discharges of pollutants into waters of the United States at Lots IR, IQ, IP, IO and QQ ("the Lots"), located in Section 22, Township 66 South, Range 29 East on Big Pine Key, Florida.

2. Mr. Banks currently owns the Lots and either placed fill on them himself with a dump truck, bulldozer or similar equipment, or had another individual place the fill for him. This fill took various forms, including rock pit material, silt, manure, organic debris, black dirt, palm fronds and refuse.

3. The subject Lots are adjacent to Bogie Channel and Pine Channel and are part of a meandering wetland slough that extends across Big Pine Key between the two channels. Both Bogie Channel and Pine Channel are tidal navigable waters and both connect to Florida Bay, a tidal

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[1] "CWA", 33 U.S.C. § 1344.

navigable water. The band of wetlands is continuous from the Banks' Lots to the navigable waters.

4. The Lots lie south of Watson Boulevard, a paved road which crosses the wetland slough between Lots IR, IQ, IP, IO and Bogie Channel.

5. Defendant Banks purchased Lots IR, IQ, and QQ in 1980, and has owned those Lots since then. Lots IO and IP were purchased by Defendant in 1988 and have been owned by him since then.

6. Prior to being disturbed by Defendant Banks, Lot IR was vegetated with buttonwood, sawgrass, red mangroves and other wetland plant species as listed in the applicable regulations. Lots IQ, IP and IO were vegetated with sawgrass, slash pine and other wetland species; Lot QQ was vegetated with white mangroves, red mangroves, sawgrass, buttonwood, and other wetland species. A red mangrove pond which has been partially filled by Defendant, is located on the northwest corner of Lot IR. A similar red mangrove pond existed on Lot QQ prior to filling.

7. The wetland slough which crosses Big Pine Key is characterized by the expert witnesses as caprock wetlands. Caprock is a limestone that is highly porous and permeable below the surface. It is somewhat smooth on portions of its surface with cracks, crevices, and low places in which hydric soil accumulates and in which wetland vegetation grows. The soils in these cracks, crevices and low places are often saturated or inundated with water. The majority of the surface area in the wetland slough is covered by hydric soils, not barren caprock.

8. Defendant Banks began filling Lots IR and IQ almost immediately after purchasing them in 1980. Utilizing bulldozers to clear these parcels, he destroyed much of the existing vegetation (buttonwood and other wetland species) and placed six inches to one foot of fill over the Lots. This filling activity, which took place over a three year period, was undertaken to prepare the land for planting the seeds for his coconut palm farming operation. Banks did not notify the Corps of these activities, or seek a permit, either prior to or while they were ongoing.

9. In the mid-1980's, Defendant Banks poured a concrete slab and built a house on Lot IQ.

10. Refuse and other organic material as fill was dumped on Lot QQ in 1983. Mr. Banks then planted coconut palms in that fill. Additional palms were planted on this lot in 1993.

11. In 1989 and 1990, the Defendant built a two to three foot raised berm of crushed limestone fill on the property on the western, southern and eastern sides of Lots IP and IO, continuing north on the eastern property line of Lots IQ and IR. Coconut palms were planted in the raised berm.

12. Defendant Banks did not have a permit required pursuant to CWA Section 404, 33 U.S.C. § 1314, authorizing any of these filling activities in waters of the United States.

13. In 1983, Curtis Kruer, field biologist for the Corps, became aware of the Defendant Banks' unlawful filling activities on Lots IR and IQ. The parties have stipulated that the Corps sent and the Defendant received

a Cease & Desist Order in regard to this activity, requesting that Banks cease his filling activity and submit an after-the-fact permit application to the Corps.

14. Defendant Banks subsequently applied for an after-the-fact permit, for fill activities on Lots IR and IQ. The Corps issued a formal public notice of the application, as required by its regulations.

15. After evaluating the site and receiving comments pursuant to the public notice, the Corps denied the after-the-fact application on April 5, 1984, on the grounds that: 1) the property was valuable freshwater wetlands, a scarce resource and important habitat for Key Deer, for shore and wading birds, and other wildlife on Big Pine Key, and that destruction of such wetlands was not in the public interest; 2) that there were alternative sites available to Banks for his activity; and 3) that the activity was not considered water dependent under the regulations.

16. Defendant Banks was contacted by the Corps concerning his actions on Lot IR and Lot IQ (then vegetated with red mangroves, sawgrass and buttonwood) and told that the unauthorized fill which he had placed on these Lots should be removed. At that time in 1984, the Corps did not regulate wetlands dominated by "slash pine", the prevalent overstory vegetation on the major portion of Lot IQ. Therefore, Banks was informed that Lot IQ, with the exception of a small northeast corner, was uplands which could be utilized to continue his farming operations. Banks was also told that a small portion of the southeast corner of Lot IR was being considered uplands due to the presence of slash pines.

17. Mr. Banks did not submit another permit application, nor did he remove the fill from Lot IR or any of Lot IQ.

18. Mr. Banks received a letter in 1985 from the Corps' Office of Counsel, advising him that failure to remove the fill would result in a referral to the United States Attorney's Office for prosecution.

19. The Corps became aware in January, 1990 that the Defendant had undertaken additional filling activities on Lot IR. The parties have stipulated that the Corps sent, and the Defendant received, a Cease & Desist Order in February, 1990, ordering Banks to stop this fill activity and restore the property.

20. The Defendant purchased Lots IP and IO, immediately south of Lot IQ, in 1990 and commenced filling activities on those two additional Lots. The parties have stipulated that the Corps sent, and the Defendant received, additional Cease & Desist Orders in November, 1990, ordering him to stop those unpermitted activities on Lots IP, IQ and QQ.

21. In the period of time between the last communication from the Corps to Defendant Banks in 1985 and the Defendant's new fill activities in 1990, the 1987 Federal Wetlands Delineation Manual was published. This manual formalized and standardized the Corps' existing methodology for determining whether a property is a wetland. The Manual requires that a property must meet three requirements: hydrophytic vegetation, hydric soil, and wetland hydrology. Also, a much expanded list of wetland vegetation was published by the United States

Fish and Wildlife Service in 1986. That list, as continuously updated, is utilized by the Corps to determine whether plants are hydrophytic.

22. Dr. William Kruczynski, the biologist who is the wetlands expert for the nine-state Region IV Office of the United States Environmental Protection Agency ("EPA"), testified that all five of the Defendant's Lots would have met the three parameters required by the 1987 Manual, had they not been filled.

23. The Defendant does not contest the evidence that the predominant vegetation on all of the Lots, including the slash pine-wiregrass community on and surrounding Lots IQ, IO and IP, meets the wetland vegetation criterion stated in the 1987 Manual.

24. G. Wade Hurt, a soil scientist with the Soil Conservation Service, United States Department of Agriculture, testified for the Plaintiff that more than fifty per cent of the Lots' surfaces are covered with hydric soils. The Court finds this testimony to be more credible than that of Defendant's expert, Dr. Luther Holloway, who testified that the Lots comprise a caprock area that is mostly solid exposed rock and has virtually no soils. Mr. Hurt accurately classified and categorized the soils and soil coverages on the Lots.

The Defendant's witnesses do not seriously dispute the testimony of Dr. Kruczynski, Mr. Hurt, and Dr. Ronald Jones, expert witnesses for the Plaintiff with extensive experience with Florida wetlands, that although barren caprock exists in small sections on the Lots and the surrounding properties, these areas were thriving wetland communities before being disturbed by

Banks. Wetlands vegetation extensively covers the property immediately surrounding the Banks' Lots.

25. Plaintiff established that the water level at each of the five Lots easily meets the minimum hydrology criterion of the 1987 Manual. All of the properties are inundated or saturated to the surface, for at least five per cent of the growing season. The root zone is the top twelve inches below the surface. The data on water levels was obtained by Mr. Kruer, using an average elevation for each of the Lots based on the stipulated survey and on actual measurements of the water levels in nearby mosquito ditches for a monitored period of 172 days.

The Defendant contends that the water levels in the mosquito ditches are not indicative of water saturation levels at the Lots because the caprock is, in the Defendant's view, not readily permeable below the surface. This contention is not born out by the record. The Defendant's expert testified he did not do any hydrological studies of the Lots, and his testimony is directly contrary to the convincing testimony of Mr. Hurt, Mr. Kruer and Dr. Jones. The Plaintiff's experts all testified that limestone is extremely porous and that numerous hydrological studies of Big Pine Key establish that the water readily travels under the surface. Thus, the Court finds the water levels in the ditches correspond to the saturation levels of the Lots and meet the saturation criterion of the Manual.

26. Dr. William Kruczynski testified that on several occasions, including the day before trial, he walked the area from Bogie Channel to Pine Channel, passing

through the subject Lots. Except for crossing Watson Boulevard and Key Deer Boulevard, Dr. Kruczynski remained in wetlands the entire way. The aerial photographs from 1975, 1981, 1983, 1984 and 1991, show wetland vegetation signatures of sawgrass and mangroves on the wetland slough traversing across the subject Lots and Big Pine Key. Dr. Kruczynski also testified that wetlands were continuous between Lot QQ and Pine Channel.

27. Dr. Holloway, testifying for the Defendant, agrees that there are wetlands from Bogie Channel all the way to Watson Boulevard. He states, however, that he believes there are upland pockets that isolate wetland pockets between Lot IR and Watson Boulevard. His testimony does not convince this Court that the wetlands between Lot IR and the tidal coast line are surrounded by uplands that would disrupt the "adjacency" of the Lot IR wetlands to Bogie Channel to Lot IR. The Court finds that continuous wetlands do exist from Lot QQ to Pine Channel, as confirmed by various aerial photographs and the testimony of the witnesses. Both Pine and Bogie Channels are tidal navigable waters which connect with Florida Bay, a tidal navigable water. A wetland slough does exist in this area.

28. The Court finds, therefore, that all five of the Lots are adjacent freshwater wetlands and that none of the Lots are isolated wetlands.

29. After the Corps' denial of his after-the-fact permit application, and issuance of the Cease & Desist Orders, the Defendant continued to fill the sites and to destroy vegetation on the sites. He did not remove any fill or endeavor to restore the sites.

30. Defendant Banks' destruction of the Lots' wetland vegetation, and his leveling, spreading and filling activities on these Lots raised their elevation.

31. The Defendant's leveling, spreading and filling activities have caused identifiable adverse effects, both individual and cumulative, on the sites, vital aquatic and habitat functions.

32. The Plaintiffs' experts testified that the Lots, which are located less than a mile from the Key Deer Refuge, provide habitat for Key Deer, an endangered species. In its filled condition, the property no longer fully serves as a ready natural source of ponded water. Also, the diversity of natural vegetation that serves as food for the Key Deer and other animals has been seriously disturbed.

33. Further, Wayne Hoffman, a research scientist for the National Audubon Society, testified that prior to being filled, the Lots were available to migratory wading birds, such as ibises, herons, and egrets, for feeding in times of high tides and heavy rains on the coast. In times of drought, these wading birds benefit from the interior freshwater wetlands, such as those that formerly were found on Banks' Lots, since fish are concentrated in the drying pools of water caught in the low areas. Non-wading birds, such as kingfishers, use the interior freshwater wetlands for feeding as well. Migratory passerine birds, such as palm warblers and the Savannah sparrow, feed on insects found in the variety of native wetland vegetation that is no longer available on the Lots which, having been filled by Banks, are intensively cultivated with a single crop.

34. A report of wildlife observations by Curtis Kruer during his 172 days of water level monitoring at the Lots (Govt. Exh. 12) shows that the properties serve as habitat for fish, frogs, Lower Keys mud turtle and box turtle, in addition to a large variety of migratory wading and non-wading birds.

35. Dr. Ronald Jones testified that the freshwater wetlands in the interior of Big Pine Key, which are part of a freshwater lens system, are critical to the proper functioning of Big Pine Key's ecosystem because, like the Everglades, they serve as a filter, and thus enhance water quality.

36. All of the biologists and other scientists who testified for the Plaintiff, Dr. Kruczynski, Mr. Kruer, Mr. Hurt, Dr. Jones and Dr. Hoffman, testified that freshwater wetlands such as the Lots in their undisturbed condition are a scarce natural resource which in the Keys, are found primarily on Big Pine Key.

37. On April 19, 1994, the Environmental Protection Agency issued Defendant Banks an Administrative Order (404-94-19) to cease any additional discharges of any pollutant on Lot QQ and to submit a restoration plan for the discharge area within fifteen days of receipt of the Order. Defendant Banks has not submitted a restoration plan for this additional violation.

III. CONCLUSIONS OF LAW

1. "The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, is a comprehensive effort by Congress to restore and maintain the chemical, physical and biological integrity of the

nation's waters." *United States v. Carter*, 18 Env't Rep. Cas. (BNA) 1804, 1807 (S.D. Fla. 1982) (citing 33 U.S.C. § 1251). The cornerstone of the CWA regulatory scheme is Section 301, 33 U.S.C. § 1311, which prohibits the discharge of pollutants into navigable waters except when in compliance with various provisions of the Act, including Section 404, 33 U.S.C. § 1344. *Id.*

2. "Section 404 establishes a program for the issuance of permits for the discharge of dredged or fill material subject to certain criteria and standards aimed at achieving the goals of the Act." *Id.* at 1807, n. 1. Pursuant to § 404(a), the Corps has responsibility for administering this permit program, by evaluating applications pursuant to promulgated federal regulations. *Id.*

3. Section 320.4 of the Corps regulations, promulgated in 1980 and in effect today, provides that in evaluating applications, the Corps engage in a public interest review (§ 320.4(a)) in which the probable impacts, including cumulative impacts, of the project on the public interest are considered. This balancing process must weigh factors such as conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, and flood hazard. No permit may be issued unless it is found to be in the public interest. 33 C.F.R. § 320.4. In addition, no permit can be issued unless it conforms to the environmental Protection Agency's Section 404(b) (1) Guidelines (40 C.F.R. 230) (33 C.F.R. § 323.6(a)) which specify additional impact review criteria.

4. The act of "discharging of a pollutant" occurred here when Defendant Banks utilized dump trucks, bulldozers and other equipment to place rock-pit fill, manure fill, silt, organic debris and other fill material on the Lots. The term "discharge of a pollutant" is defined in 33 U.S.C. § 1362(12) as "any addition of any pollutant to navigable waters from any point source." *See Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 923 (5th Cir. 1983). The term "point source" includes bulldozers, dump trucks, and other equipment used to place dredged or fill material in waters of the United States. *Weiszmann v. District Engineer, United States Army Corps of Engineers,* 526 F.2d 1302, 1306 (5th Cir. 1976).

5. Rock fill, dirt, organic debris, and biological materials fall within the broad meaning of the term "pollutant". 33 U.S.C. § 1362(6); *United States v. Carter,* 18 Env't Rep. Cas. at 1807; *United States v. Huebner,* 752 F.2d 1235, 1242 (7th Cir.), *cert. denied,* 474 U.S. 817 (1985). Defendant's covering, leveling, grading, and filling of the formerly vegetated sites at issue were discharges of a dredged soil, biological material, rock and/or sand, each of which is defined as a pollutant by the CWA. These discharges changed the bottom elevation of the sites. *See Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d at 924-25. (landowner violated CWA by discharging fill materials into wetland in an effort to change the bottom elevation of the land and convert it to upland.)

6. "Navigable waters" means "waters of the United States," 33 U.S.C. § 1362(7). "Waters of the United States" are defined by 33 C.F.R. § 328.3(a)(1), (3), (5) and (7) and 40 C.F.R. § 232.2(q)(1), (3), (5) and (7) to include the following: (i) all waters which are currently used, were

used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all other waters such as, among other things, wetlands or sloughs, the use, degradation or destruction of which could affect interstate or foreign commerce; (iii) tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

7. "Wetlands" are defined by 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2(r), as those areas that are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 U.S.C. § 1344(a)-(b); 33 C.F.R. § 328.3(b); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985). "Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b).

8. Congress intended the statutory definition of "waters of the United States" to assert "federal jurisdiction" over the Nation's waters to the maximum extent possible under the Commerce Clause of the Constitution. *See Riverside Bayview Homes*, 474 U.S. at 133-34; *Tilton*, 705 F.2d at 431.

9. The parties have agreed that the determination of the wetlands issue shall be controlled by the Corps of Engineers Wetlands Delineation Manual (1987) ("the Manual"). The Manual provides that a wetland must meet three parameters: it must have hydrophytic vegetation, hydric soil and wetland hydrology. To determine hydrophytic vegetation, the Manual states the criterion as follows: more than fifty per cent of the dominant species shall be "obligate" wetland species (plants that occur

almost always in wetlands under natural circumstances), "facultative wetland" species (plants that occur usually in wetlands) or "facultative" species (plants with a similar likelihood of occurring in both wetlands and non-wetlands). (Manual at 18-19.)

10. Wetland delineation also requires the presence of "hydric" soils which are defined as soils that are saturated, flooded or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation. (Manual at 14 and 26.)

11. An area will meet the hydrology test for wetlands if the soil is saturated to the surface for a specified period of time during the growing season. This period of inundation or soil saturation varies according to the hydrologic/soil moisture regime and occurs in both tidal and nontidal situations. The subject Lots exceed the minimum hydrological criterion of inundation or saturation within twelve inches of the surface for five per cent of the growing season (Manual at 36-38.)

12. Dr. Kruczynski, Mr. Hurt, Mr. Kruer and Dr. Jones testified that all of the Banks' Lots meet the three parameters outlined above. The Court finds this testimony convincing for the reasons outlined in the Court's Findings of Fact. Therefore, under the law and regulations and the Manual promulgated thereunder, the Court finds that the Lots are freshwater wetlands.

13. The law also requires the Court to decide if the Lots are "adjacent" or "isolated" wetlands. This determination must be made because if the wetlands are isolated and less than one acre of fill was placed in the

wetland in 1980-1983, under the controlling regulations in 1977 and 1982, the Defendant would have been potentially eligible for a general permit for Lot IR and the wetland portion of Lot IQ. However, if the wetlands are found under the law to be adjacent or if the Corps chose to override any applicable general permit because of the cumulative effect of the fill, then the Corps acted properly in requiring the Defendant to submit an application for an individual permit. *See O'Connor v. United States Army Corps of Engineers,* 801 F. Supp. 185, 190-91 (N.D. Ind. 1992) (describing Corps permitting process).

It is the Defendant's position that the five Lots in question are "isolated" and not "adjacent" wetlands to either Bogie Channel or Pine Key Channel. The Defendant argues that the subject Lots are all at least one-half mile from either of the two navigable water channels and thus have no hydrological relationship with any body of navigable water. Between Lots IO through IR and Bogie Channel is a fifty foot wide paved, elevated street called Watson Boulevard. This street, constructed decades ago, blocks any flow of water between Defendant's Lots and the navigable waters of Bogie Channel according to the testimony of Defendant's witness.

14. Adjacent means bordering, contiguous, or neighboring. Wetlands, even if separated from other waters of the United States by dikes, barriers, natural berms, beach dunes and the like, are still considered "adjacent wetlands." 33 C.F.R. § 328.3(c); *United States v. Tilton,* 705 F.2d at 431.

15. The regulations provide that even if it were found that the flow of surface water from the Lots into a

navigable water were impeded by a manmade barrier such as Watson Boulevard, that does not defeat a finding that wetlands are adjacent and therefore subject to the individual permitting process. *Id; United States v. Lambert,* 589 F. Supp. 366, 371 (M.D. Fla. 1984). Thus, even if Watson Boulevard impedes or partially blocks the free flow of the surface connection between the Lots and Bogie Channel, the Lots are still adjacent wetlands. In light of the regulation establishing that manmade barriers cannot be considered isolating mechanisms, no hydrological connection to other waters is required for a wetland to be considered adjacent.

More importantly, however, in this case, the government established that such a connection exists through ground water and through surface waters during storm events. Such a hydrological connection to neighboring navigable waters primarily consisting of ground water rather than surface water, except in times of storms, such as hurricanes, therefore further supports a finding of adjacency. *United States v. Tilton,* 705 F.2d at 431, n. 1.

16. A finding of adjacency may be bolstered by a showing of ecological links with neighboring navigable waters, such as serving as wetland habitat for wading and non-wading birds, reptiles and fish as well as by testimony regarding the performance of water quality filtering functions. *Id.*

17. Therefore, the expert scientific and wildlife observation testimony offered on behalf of the Plaintiff establishes that the Lots are adjacent from an ecological standpoint in that: 1) there is a surface connection between the Lots and navigable waters during storms

and a subsurface connection at all times; and 2) the Lots serve as habitat for wading and non-wading birds, fish, Lower Keys mud turtles and box turtles, a variety of snakes, and other wildlife.

18. Dr. Kruczynski, Mr. Kruer, and Dr. Jones also testified that the Lots are a part of a meandering wetland slough traversing Big Pine Key to Pine Channel on the west and Bogie Channel on the east. There is no credible contrary testimony in the record. Therefore, under the law, the Lots are adjacent wetlands, not isolated wetlands, and thus do not qualify for a general or nationwide permit.

19. In its undisturbed condition, all of Lot IQ would properly be considered, under the 1987 Manual, an adjacent freshwater wetland, as are all of the other four Banks' Lots.

20. The government in 1983, under less well developed standards concerning slash pine trees, advised Mr. Banks that the major portion of Lot IQ was primarily an *upland* Lot. For this reason, the Plaintiff waives any restoration rights it may have, as well as any finding of violation of the CWA, regarding the major portion of Lot IQ. The Court finds that the Corps appropriately delineated the major portion of Lot IQ and a small portion of Lot IR, primarily an upland Lot in 1983, though both lots would be delineated an adjacent freshwater wetlands today under the 1987 Manual. The changed position today, is grounded on additional knowledge the Corps has gained in regard to wetland delineation, and, specifically, in regard to wetland vegetation classification. *See Alma v. United States*, 744 F. Supp. 1546, 1561-62 (S.D. Ga.

1990) (finding that EPA did not act arbitrarily in changing its prior determination when agency gave reasoned explanation and effectuated change to serve public interest). Wetlands constitute a productive and valuable resource. Their unnecessary and unpermitted filling and destruction constitutes a serious violation of the CWA and should be discouraged as contrary to the public interest.

21. Wetlands perform vital functions important to the environment. These scarce interior freshwater wetlands of Big Pine Key serve, among other things, as habitat for the endangered Key Deer species and for a variety of migratory wading and non-wading birds, e.g., including egrets, herons, ibises, kingfishers and warblers. The testimony proffered by the Plaintiff shows that these wetlands also serve to enhance water quality, an important wetland function. *Conant v. United States*, 786 F.2d 1008, 1009 (11th Cir. 1986) (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985)). It is well established that wetlands such as these also serve as storage areas for storm and flood waters and to stem erosion and control sedimentation. *See* 33 C.F.R. § 320.4(b); 40 C.F.R. § 230.41; *Riverside Bayview Homes*, 474 U.S. at 134.

22. The Court concludes that the Lots at issue constituted waters of the United States at the time of the Defendant's activities.

23. The Court concludes that the Lots also constituted jurisdictional wetlands at the time of the Defendant's activities.

The Court concludes that these Lots do not qualify for waiver of regular Corps permitting procedures under the silviculture activity exclusion, 33 U.S.C. § 1344(f)(1)(A); 33 C.F.R. 323.4 or Nationwide Permit 26 and its predecessors, 33 C.F.R. § 330.4(a)(2) (1982) and 33 C.F.R. § 330.5(a)(26)(ii) (1984, 1986).

24. The Court also concludes that the Defendant's continuous and continuing disregard for the government's regulatory demands that he cease filling these freshwater wetlands violated applicable law and harmed the environment.

25. The Court concludes that the Defendant has violated the Clean Water Act by discharging pollutants in the form of fill into the waters of the United States on Lots IR, IP, IO, QQ and a portion of IQ, without a permit.

26. Section 1314(b) of CWA requires compliance with administrative orders. The Court concludes that the Defendant has violated the CWA by failing to comply with the EPA's administrative order requiring him to restore the disturbed wetlands on Lot QQ.

For the foregoing reasons, the Court finds in favor of the Plaintiff and against the Defendant.

It is

ORDERED, ADJUDGED and DECREED as follows:

1. The Defendant Parks B. Banks, his agents or employees, be and they are hereby enjoined from discharging additional fill materials into the property owned by him on Big Pine Key, Florida, as described in this Memorandum Opinion.

2. The Defendant, Parks B. Banks, be and he is hereby ORDERED to remove (or cause to be removed) the fill material which he has unlawfully discharged into said wetlands, in accordance with a time schedule to be agreed upon between Defendant and Plaintiff. This time schedule, for removal of the unauthorized fill material, shall be filed with the Court on or before February 14, 1995.

3. Restoration of the wetlands to their undisturbed condition prior to the unlawful filling, and determination of civil penalties shall be adjudicated at a trial to be scheduled by separate order.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Justice Building, Miami, Florida, this 13th day of January, 1995.

/s/ JAMES LAWRENCE KING
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT
OF FLORIDA

cc: Barbara K. Bisno, AUSA
Martin F. McDermott, Dept. of Justice
James B. [sic] Mattson, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-10107-CIV-KING

UNITED STATES OF AMERICA,

Plaintiff/Counterdefendant,

vs.

PARKS B. BANKS,

Defendant/Counterplaintiff.

_____/

FINAL JUDGMENT

THIS CAUSE comes before this Court *sua sponte*. After bifurcated bench trials on liability and damages, the Court issued a memorandum opinion on liability on January 13, 1995 and an Order Requiring Restoration and Imposing Penalty and Injunctive Relief on August 28, 1995.

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that FINAL JUDGMENT be, and the same is hereby, ENTERED in favor of Plaintiff, the United States, in accordance with this Court's *Opinion* dated [sic] January 13, 1995 and *Order* dated August 28, 1995.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Justice Building, Miami, Florida, this 1st day of September, 1995.

/s/ James Lawrence King
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT
OF FLORIDA

cc: Lisa B. Hogan, AUSA
Martin McDermott, Esq.
James Mattson, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)	CIV-KING
Plaintiff/Counterdefendant,	)	Case No. 91-10107
v.	)	
PARKS B. BANKS,	)	
Defendant/Counterplaintiff.	)	

ORDER REQUIRING RESTORATION, AND IMPOSING PENALTY AND INJUNCTIVE RELIEF

1. This civil enforcement action was brought by the Plaintiff, the United States of America, pursuant to sections 301 and 404 of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §§ 1311, 1344, in an effort to restore valuable freshwater wetlands on Big Pine Key, Florida, located on property owned by Parks B. Banks ("Defendant" or "Banks"). In its Complaint and prayer for relief, the United States requested that Court enjoin the future discharge by Banks of additional dredged or fill materials into these wetlands, to require Banks to restore the wetlands to their undisturbed condition prior to such unlawful discharges by removing the fill and otherwise implementing a restoration plan, and to require Banks to pay an appropriate civil penalty.

2. The action was bifurcated in the interest of judicial economy. The liability phase was tried before the Court in a bench trial in November 1994; adjudication of

restoration issues and the determination of the civil penalty to be assessed against Banks were deferred to a second phase.

3. On January 13, 1995, the Court rendered its Memorandum Opinion[1] on liability issues, finding, *inter alia*, that (a) Banks unlawfully placed unauthorized fill on lot IR and a portion of Lot IQ on Big Pine Key, Florida, which are jurisdictional freshwater wetlands adjacent to navigable and tidal waters of the United States; (b) Banks did not remove that fill when ordered to do so by the United States Army Corps of Engineers (the "Corps") in 1984, after the Corps denied the Defendant's after-the-fact permit application; (c) in the years following this permit denial, Banks unlawfully placed additional fill on three other Lots (Lots IO, IP and QQ) he owns on Big Pine Key, which three lots are also jurisdictional freshwater wetlands adjacent to navigable and tidal waters of the United States that could not lawfully be filled without a CWA section 404 permit; and (d) that all of the above unauthorized and unlawful filling activities, as well as Banks' land-levelling activities and his mechanized removal of natural vegetation, were performed by Banks and his agents to convert the sites to uplands for use in Banks' coconut palm nursery operations.

4. In light of these liability findings, the Court enjoined Banks, his agents or employees from discharging additional fill material into his property on Big Pine Key, Florida as more specifically described in the Court's Memorandum Opinion. The Court scheduled a separate

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[1] Reported at 873 F. Supp 650 (S.D.Fla. 1995)

hearing to adjudicate restoration issues and to determine the civil penalty to be assessed against Banks for his violations of the CWA.

5. The separate hearing on restoration and civil penalty was held in Key West, Florida on July 24 and 25, 1995. As to those issues, the Court finds in favor of the United States and against the Defendant, as follows:

RESTORATION

6. As previously found by this Court, these wetlands in their undisturbed condition function as valuable habitat for many species of birds and other wildlife on Big Pine Key, including endangered and threatened species such as the Key deer, White Crowned pigeon, Lower Keys marsh rabbit and Lower Keys mud turtle. These interior freshwater wetlands also serve other important functions, including acting as a filter and thereby enhancing water quality.

7. Reversal of the ecological injury inflicted by the Defendant can likely be achieved by the careful, long-term restoration contemplated in the restoration plan (the "Restoration Plan") prepared by Environmental Consultant, Roy R. Lewis and proposed by the United States.

8. In general terms, the Restoration Plan submitted by the United States consists primarily of restoring the artificially elevated and damaged lots to their original elevation by removing the fill placed in the Corps' jurisdictional wetlands (the "Restoration Areas," as depicted

in the Restoration Plan)[2] and allowing the excavated areas to naturally re-vegetate from neighboring seed sources. The Restoration Plan also contemplates that a thin layer of organic mulch will be applied in appropriate areas to enhance the successful return of hydrophytic vegetation to the sites. The submitted Restoration Plan further requires Banks to remove all existing coconut palms, both those that are planted in the ground and those that are planted in pots, from wetlands Restoration Areas. The Restoration Plan contemplates a five-year implementation schedule, during which time the Defendant is required periodically to submit monitoring reports. The Restoration Plan includes a number of other provisions intended to facilitate the restoration of these Lots.

9. During the July 1995 hearing, the Defendant agreed and stipulated to the adoption in full of the Restoration Plan submitted by the United States, with minor modifications to the time-tables governing removal of vegetation (which modifications are noted on an addendum attached to the Restoration Plan). The Court has

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[2] Banks was informed by the Corps in 1984 that most of Lot IQ (with the exception of a small portion) was uplands which could be utilized to continue his farming operations. Banks was also told at the time that a small portion of the southeast corner of Lot IR was then also considered uplands due to the presence of slash pines. Although these representations are not legally binding, the United States does not seek in its Restoration Plan, and this Court does not order, the removal of fill (or the removal of the Defendant's house and its related improvements) from most of Lot IQ, or from the southeast corner of Lot IR. The specific areas of restoration are shown on the maps included in the Restoration Plan.

reviewed the Restoration Plan, and finds it to be practical, feasible, cost-effective and reasonable under the circumstances.

10. Therefore, the Defendant is ordered to implement, according to the schedule set forth therein, each and every component of the Restoration Plan, a complete copy of which is attached hereto, and which Restoration Plan is hereby adopted in full as an order of this Court.

PENALTY

11. Clean Water Act section 309(d) provides that violators of the Act "shall be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. § 1319(d). Thus, in addition to restoration of the wetlands, the CWA requires that the Court impose a civil penalty upon the Defendant.

12. In determining the amount of a civil penalty, the Court is directed by the statute to consider:

(1) the seriousness of the violation or violations,

(2) the economic benefit (if any) resulting from the violation,

(3) any history of such violations,

(4) any good-faith efforts to comply with the applicable requirements,

(5) the economic impact of the penalty on the violator, and

(6) such other matters as justice may require.

CWA section 309(d), 33 U.S.C. § 1319(d)

13. At the hearing on this matter, the Court heard testimony and received evidence on the amount of the penalty to be assessed. In light of the evidence presented at the hearing, and taking into account the statutory factors set forth above, the Court hereby orders that the Defendant is to implement the Restoration Plan which will result in an investment loss of approximately $150,000 in past labor and $175,000 in past costs and a potential loss on the sale of the existing vegetation due to the compliance dates mandated by the Plan; pay the entire cost of implementing the Restoration Plan – approximately $37,500 and pay a civil penalty in the amount of $10,000 to the United States Treasury, within 30 days from the date of this Order.

14. The Court's previous injunction in this case – in which the Defendant and his agents and employees were enjoined from discharging additional fill materials into the property owned by him on Big Pine Key, Florida, as described in the Court's previous Memorandum Opinion and in this Order – continues in effect. The Court further specifically orders the Defendant and his agents and employees not to discharge or place any additional fill materials, including but not limited to soil, dirt, organic debris, palm fronds, stones, broken caprock, trash or other fill materials, from whatever source and whether intended for temporary storage or permanent placement, anywhere on or in the subject wetland property without a permit.

15. The Court retains jurisdiction to enforce the terms of the Restoration Plan, the payment of the civil penalty, and the enforcement of the injunctive relief granted herein.

DONE and ORDERED this 1st day of September, 1995 in Miami, Florida.

/s/ JAMES LAWRENCE KING
James Lawrence King
United States District Judge

cc: Lisa B. Hogan, AUSA
Barbara K. Bisno, AUSA
Martin McDermott, DOJ
William Baxter, ACOE
James Mattson, Esq.

Watson
Boulevard
1983 Upland-
Wetland Line (red)
Restoration
Stayed
"Wet"
"Up"
"Wet"
IR
IO
"Up"
IP
IO
Mid-80's Upland-
Wetland Line (blue)
Restoration
Completed

BEST AVAILABLE COPY

28 U.S.C.A. § 2462 Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

(June 25, 1948, c. 646, 62 Stat. 974.)

(2)

Supreme Court, U.S.
FILED
DEC 5 1997
CLERK

No. 97-602

In the Supreme Court of the United States

OCTOBER TERM, 1997

PARKS B. BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
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1688

QUESTIONS PRESENTED

1. Whether an action by the United States for injunctive relief to remedy the illegal discharge of fill materials into waters of the United States is subject to the statute of limitations that applies to "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" (28 U.S.C. 2462).

2. Whether saturated lands that are hydrologically connnected to navigable waters through groundwater constitute wetlands within the regulatory scope of the Clean Water Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-602

PARKS B. BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-15) is reported at 115 F.3d 916. The opinion of the district court (Pet. App. 16-37) is reported at 873 F. Supp. 650.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1997 (Pet. App. 1a-2a). On September 15, 1997, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 2, 1997, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, is designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The central mechanism for meeting that objective is the prohibition against the discharge of pollutants into navigable waters without a permit. See 33 U.S.C. 1311(a), 1344(a). The Act defines the term "navigable waters" comprehensively as "the waters of the United States." 33 U.S.C. 1362(7). The breadth of this definition reflects the intention of Congress

> to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

Section 404(a) of the Act authorizes the Secretary of the Army, acting through the Corps of Engineers, to issue permits for the discharge of "dredged or fill material" into "waters of the United States." 33 U.S.C. 1344(a). The regulations issued under this statute have consistently defined the term "waters of the United States" to encompass a broad range of "wetlands."[1] The "wetlands" within the "waters of

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[1] The term "wetlands" encompasses "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions[,] [which] generally

the United States" include (i) isolated wetlands that may affect interstate commerce, (ii) interstate wetlands and (iii) wetlands that are adjacent to navigable waters or their tributaries. See 33 C.F.R. 328.3(a).

The Corps of Engineers has authority to issue individual permits for specific projects or general regulatory permits for discharges into waters of the United States. Individual permits may be issued only after an opportunity for public comment and only upon an evidentiary record that discloses the nature of the proposed discharges and their anticipated effects. See 33 U.S.C. 1344(a); 33 C.F.R. Pts. 320, 325. A "regulatory" or "nationwide" permit may be issued by the Corps to provide streamlined approval for categories of discharges that (33 U.S.C. 1344(e)(1))

> will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

2. Petitioner owns five tracts of land on Big Pine Key in Monroe County, Florida. He purchased three of the lots in 1980 and the remaining two in 1988. He acknowledges that, beginning in 1980 and continuing into 1983, he destroyed existing vegetation on the three lots he then owned, placed fill on them and planted coconut trees in the fill (Pet. App. 4-5). He also poured a concrete slab and built his winter residence on one of the lots (*ibid.*).

On March 30, 1983, a biologist from the Corps of Engineers informed petitioner that portions of two of the tracts he had filled were wetlands subject to the

---

include swamps, marshes, bogs, and similar areas." 33 C.F.R. 328.3(b).

Clean Water Act and that discharges onto those areas were unlawful in the absence of a valid permit. On April 7, 1983, the Corps issued a cease and desist order, stating that enforcement action would be taken against petitioner if he continued to make unpermitted discharges. The order also invited petitioner to apply for an individual permit for filling the wetlands areas (Pet. App. 5).

On April 16, 1983, petitioner applied for an individual permit that would have authorized his discharges retroactively (see 33 C.F.R. 326.3(c) (1983)). Several government agencies and interested members of the public submitted comments opposing that request. The U.S. Fish and Wildlife Service opposed the permit because freshwater wetlands on Big Pine Key provide scarce habitat for the endangered Key Deer, migratory birds and other wildlife. GX 16, at 66. The South Florida Water Management District informed the Corps that state law prohibited the discharges without a "Surface Water Management Permit." Monroe County, which had already taken enforcement action against petitioner for filling one of his lots in violation of a County ordinance, also opposed the application. *Id.* at 72.

On April 5, 1984, the Corps denied the application. In doing so, the Corps stated that petitioner's discharges had "resulted in significant localized adverse impacts to fish and wildlife resources, vegetated wetlands, and water quality." GX 16, at 81. The Corps also found that "less damaging alternatives" to the filling of wetlands were available, such as expansion of petitioner's coconut tree nursery on upland areas (*ibid*). The letter advised petitioner that, unless he contacted the Corps to negotiate restoration

measures, an enforcement action would be commenced (*ibid.*).

Petitioner therafter made no effort to arrange for restoration of the two lots. Instead, he placed additional fill on these areas without a permit (Pet. App. 25). In addition, in March 1988, he acquired two additional lots adjacent to those for which an "after-the-fact" permit had been sought and denied. He proceeded to clear and fill the additional lots between 1988 and 1991 (*id.* at 5).

In 1990, the Corps issued four cease and desist orders to petitioner. Each order stated that petitioner, with notice that his conduct was unlawful, had discharged fill into waters of the United States without a permit. Petitioner responded by filing suit against the Corps. He sought a declaration that his activities did not require a permit and an injunction barring further enforcement actions. The district court dismissed that suit on ripeness grounds. *Banks* v. *Page*, 768 F. Supp. 809 (S.D. Fla. 1991), rev'd in part, vacated in part, 963 F.2d 385 (11th Cir. 1992) (Table) (No. 91-5632).

3. a. On December 19, 1991, the United States filed suit against petitioner, alleging that he had unlawfully discharged fill into waters of the United States. The United States sought an order directing petitioner to remove the unlawful fill and to restore the degraded wetlands or create new wetlands for areas that could not be restored. The government also sought an award of civil penalties against petitioner.

Petitioner moved to dismiss the government's action. He asserted that his discharges were authorized by Nationwide Permit No. 26 (N.P. 26), a regulatory permit issued in 1984 to authorize discharges into certain headwaters and isolated waters, subject

to various protective conditions. Petitioner also asserted that the United States was barred by the statute of limitations from seeking civil penalties for violations of the Clean Water Act that occurred more than five years before the filing of this suit. The statute on which petitioner relies, 28 U.S.C. 2462, provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued" (*ibid.*).

The district court denied petitioner's motion. The court held that N.P. 26 does not authorize the filling of "adjacent" wetlands. The court also rejected the limitations defense under 28 U.S.C. 2462 because (i) the United States did not seek any civil penalty for violations that occurred more than five years before the filing of the suit and (ii) the limitations period for actions to enforce civil penalties does not apply to claims by the United States for injunctive relief.

b. The district court then conducted a trial on the merits of the government's claims. Four scientific experts testified that petitioner's lots constituted wetlands under the criteria set forth in the *Wetlands Delineation Manual* issued by the Corps in 1987 (GX 24). These experts also testified that the lots are part of a larger wetlands system, a freshwater slough that spans Big Pine Key from Pine Channel on the west to Bogie Channel on the east. Petitioner called one witness, who testified that only small portions of his lots were wetlands and that none of these areas should be considered adjacent to Pine or Bogie Channels (Pet. App. 23-25).

On this evidentiary record, the district court determined that petitioner's lots constituted wetlands

within the regulatory jurisdiction of the Clean Water Act. The court found that, prior to petitioner's activities, the lots had been dominated by hydrophytic vegetation (Pet. App. 19-21), had been inundated or saturated "for at least five per cent of the growing season" (*id.* at 24) and were covered, over "more than fifty per cent of [their] surfaces," by hydric soils (*id.* at 23). The court further ruled that a "meandering wetland slough" spans Big Pine Key between Pine and Bogie Channels, forming a "band of wetlands [that] is continuous from [petitioner's] Lots to the navigable waters" (*id.* at 18-19). The court reasoned that petitioner's lots, which were a part of this meandering wetlands slough adjacent to the channels, were therefore also adjacent freshwater wetlands, subject to the regulatory jurisdiction of the Clean Water Act (*id.* at 25, 33-34). The district court further determined that N.P. 26 had not authorized discharges into wetlands—such as the freshwater slough that encompasses petitioner's lots—that are adjacent to tidal, navigable waters (*id.* at 36).

Because petitioner's actions violated Section 301(a) of the Clean Water Act, the court enjoined him from discharging additional fill into the lots. After a further hearing on remedies, the district court ordered petitioner to restore the wetlands and to pay $10,000 in civil penalties (Pet. App. 40-46).

4. The court of appeals affirmed (Pet. App. 3-15). On the statute of limitations issue, the court held that the plain language of 28 U.S.C. 2462 applies only to actions to enforce "any civil fine, penalty, or forfeiture" and thus "does not apply to equitable remedies" (Pet. App. 7). The court of appeals rejected petitioner's reliance upon the "concurrent remedy rule," under which an equity court exercising "concurrent

jurisdiction" to enforce a legal obligation "will withhold its relief * * * where the applicable statute of limitations would bar the concurrent legal remedy" (*id.* at 7-8, quoting *Cope* v. *Anderson*, 331 U.S. 461, 464 (1947)). The court of appeals stated that application of the concurrent remedy rule to the equitable remedies established under federal law for the United States would be improper because, in the absence of "a clear expression of Congress to the contrary[,] a statute of limitation does not apply to claims brought by the federal government in its sovereign capacity" (Pet. App. 8).

The court of appeals upheld the judgment of the district court on the merits. The court held (i) that the factual determination that petitioner's lands "have the hydrological connection needed to qualify as adjacent wetlands" was not clearly erroneous (Pet. App. 13) and (ii) that petitioner had failed to establish that his activities were permitted by N.P. 26 (*id.* at 13-15).

DISCUSSION

There is a conflict among the courts of appeals on the question whether an action by the United States for equitable relief is governed by the statute of limitations that applies to actions "for the enforcement of any civil fine, penalty, or forfeiture" (28 U.S.C. 2462). For the reasons explained in the petition filed by the government in *Federal Election Commission* v. *Williams*, No. 97-601, review by this Court to resolve that conflict is warranted.[2]

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[2] We are providing herewith to petitioner a copy of the government's petition in No. 97-601.

There is, however, no conflict among the circuits on any of the remaining questions presented in this case. Nor do those questions concern matters of recurring importance. Further review of those questions is thus not warranted.

1. This case presents the same question presented in *Federal Election Commission* v. *Williams*, No. 97-601. In that case, the United States sought an injunction barring future violations by an individual of the substantive prohibitions of the Federal Election Campaign Act of 1971. The Ninth Circuit held in *Williams* that 28 U.S.C. 2462 governs claims for equitable relief by the United States for violations of federal law because, when the "claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both." 104 F.3d 237, 240 (1996). That holding in *Williams* conflicts with the conclusion of the court of appeals in this case that "section 2462 does not apply to equitable remedies" (Pet. App. 7).

The petition in the present case should therefore be held and disposed of as appropriate in light of the Court's disposition of the petition in *Williams*.

2. The petition in the present case raises three additional questions that do not warrant review by this Court. Because petitioner concedes that two of these additional questions lack sufficient importance to warrant further review (Pet. 18-19), we will address only the remaining question.[3] That question

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[3] The petition states that the third and fourth questions presented, whether caprock limestone can be jurisdictional wetlands and whether N.P. 26 exempts all activities on land that is "non-tidal" and "not part of a surface tributary system" from regulation pursuant to the Clean Water Act (Pet. i), do not independently warrant review, but are included "in the event

is whether the record of this case supports the conclusion that the lots owned by petitioner constitute wetlands subject to regulation under the Clean Water Act.

Petitioner errs in contending (Pet. 6-14) that the determination that the saturated lands at issue in this case constitute wetlands because they are hydrologically connected to neighboring navigable waters through groundwater conflicts with case authority interpreting the jurisdictional reach of the Clean Water Act. Petitioner incorrectly asserts (Pet. 7-10) that several courts of appeals have held that groundwater connections with navigable waters are not sufficient to establish Clean Water Act jurisdiction over wetlands. The cases cited by petitioner, however, do not address the delineation of adjacent wetlands.[4] Instead, these cases address the question whether groundwater is itself subject to regulation pursuant to the Clean Water Act. That question is not presented in this case.

The question here is, instead, whether the existence of a groundwater connection between wetlands and other waters of the United States is an appropriate basis for a determination whether wetlands are "adjacent" to other regulated waters (Pet. App. 12-13). The ruling of the court of appeals in this case that the

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this Court considers them important enough to be considered in the context of the balance of the case" (Pet. 19).

[4] *Village of Oconomowoc Lake* v. *Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.); cert. denied, 513 U.S. 930 (1994); *Town of Norfolk* v. *United States Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992); *Quivira Mining Co.* v. *United States Envtl. Protection Agency*, 765 F.2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986); and *Exxon Corp.* v. *Train*, 554 F.2d 1310 (5th Cir. 1977).

filled lands are "wetlands" is consistent with the regulatory definition of wetlands as "those areas that are inundated or saturated by surface *or ground water* at a frequency and duration sufficient to support * * * vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 328.3(b) (emphasis added). As this Court observed in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985), this definition "could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands."

In a holding consistent with *United States* v. *Tilton*, 705 F.2d 429 (11th Cir. 1983), the court of appeals further concluded in this case that petitioner's lands fell within the regulatory definition of "adjacent wetlands." That term is defined to include "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. 328.3(c). The district court found that petitioner's lands were part of a continuous "meandering wetland slough" that traverses Big Pine Key from Pine Channel to Bogie Channel (Pet. App. 18-19). Evidence in the record supported the finding that this slough, consisting of lands saturated and connected by groundwater, falls within the regulatory definition of "adjacent wetlands" due to its proximity and connection to both channels (*id.* at 25, 33-34). The court of appeals correctly concluded that neither the location of petitioner's lands at a point within the slough that is one-half mile distant from the channels nor the separation of those lands from the remainder of the wetlands by Watson Boulevard affects the determination that the lands are "adjacent wetlands" as defined

by 33 C.F.R. 328.3(c)—for all of the lands within the slough are hydrologically connected with navigable, tidal waters (Pet. App. 12-13). Further review of the factual determinations "concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)) is not warranted. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

CONCLUSION

With respect to the statute of limitations question, the petition for a writ of certiorari should be held and disposed of in light of the disposition of the petition in *Federal Election Commission* v. *Williams*, No. 97-601. With respect to the remaining questions, the petition should be denied.

Respectfully submitted.

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DECEMBER 1997